THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/02.185b

CESR's Advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive

Consultation Paper

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I . INTRODUCTION

1. CESR invites responses to this consultation paper on its proposed advice to the European Commission regarding technical implementing measures for the proposed directive on "The prospectus to be published when securities are offered to the public or admitted to trading".

2. The deadline for submitting responses to the paper is 31 December 2002. Responses should be addressed to Mr. Fabrice Demarigny, Secretary General, CESR, by email at secretariat@europefesco.org. Given the 31st March 2003 deadline set by the European Commission for receipt of CESR's advice, CESR cannot guarantee that due consideration will be given to responses received after 31st December 2002.

3. In order to facilitate the consultation process, CESR is planning to hold an open meeting on 26 November 2002 in Paris at the CESR premises. Please register your interest in participating with Mr. Fabrice Demarigny at the above e-mail address.

Background

4. On 30 May 2001, the European Commission published a *Proposal for a directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading* (the "Prospectus Directive Proposal").

5. On 14 March 2002, the European Parliament adopted amendments to the Commission Proposal ("Parliament's Report").

6. In accordance with the procedures outlined in the Lamfalussy Report, the Commission published its *Provisional request for Technical Advice on Possible Implementing Measures on the Future Directive on the prospectus to be published when securities are offered to the public or admitted to trading* (the "Provisional Request") on 27 March 2002. The Commission asks CESR to deliver its technical advice by 31 March 2003.

7. On 9 August 2002, the European Commission published an amended version of the existing proposal (the "Commission Proposal").

8. The Provisional Request is based on the original text adopted by the Commission. The present paper takes into account the amended version. As a result, some of the specific requests may no longer be appropriate.

9. CESR set up an Expert Group on Prospectus, chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Securities Commission and supported by Ms Silvia Ulissi of the CESR Secretariat. In addition, under the terms of CESR's Public Statement of Consultation Practices (Ref: CESR/01-007c), a Consultative Working Group (the "CWG") has been established to advise the Expert Group.

10. On 27 March 2002, CESR published a Call for Evidence (Ref: CESR/02-048) inviting all interested parties to submit views by 17 May 2002 as to what CESR should consider in its advice to the Commission. CESR received around five submissions. The issues covered by these submissions were integrated into the work of the Group.

11. This consultation paper does not deal with all the issues raised in the Provisional Request. In particular, due to the tight deadline, it has not been possible to produce disclosure requirements for every security type in issue. CESR will consult on many of the outstanding disclosure requirements in an "Addendum to the Consultation Paper" which CESR plans to produce before the end of this year. The consultation period for the Addendum will be shorter than three months in order to meet the Commission's deadline for advice (31st March 2003).

12. Depending on the outcome of this consultation, CESR may hold a second consultation and/or open meeting in February 2003.

References

13. The Provisional Request asks that CESR's advice take into account, among other things, certain principles, resolutions and statements as follows:

- the Commission Proposal (for a directive on prospectuses)[1];
- developments in the Council of the European Union and European Parliament regarding the Commission Proposal;
- the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001 (the "Stockholm Resolution"); and
- the Parliament's resolution on the implementation of financial services legislation (5 February 2002) and the Commission's formal declaration in response.

14. Papers published by CESR in this area are:

[1] The amended version of the proposal, as adopted on 9 August 2002 is taken into account.

- *A European Passport for Issuers – A report for the European Commission* – January 2001 (Ref. FESCO/00-138b)

- *A European Passport for Issuers: an additional submission to the European Commission* –August 2001 – (Ref. FESCO/01-045)

- *Stabilisation and Allotment, a European Supervisory Approach* – April 2002 (Ref. CESR/02-020b)

II. PRELIMINARY STATEMENT BY FERNANDO TEIXEIRA DOS SANTOS

15. The adoption of the Proposed Directive on the prospectus to be published when securities are offered to the public or admitted to trading and its implementation will be decisive to the development of an effective, competitive and integrated financial market in Europe. Facilitating the widest possible access to capital markets, namely through simplified and more flexible regulatory requirements to issuers, has to be balanced against the principles of protection and appropriate information for investors. Clearly, CESR recognizes that this is not only our main objective, but also one of our main challenges concerning the current work on the definition of a European passport for issuers.

16. The Proposed Directive is one of the two proposed directives to employ the new, four-level legislative process recommended in the Lamfalussy Report. This four-level legislative process consists of:

– Level 1: directives that confine themselves to framework principles where CESR has no formal participation;

– Level 2: implementing measures developed by the Commission on the advice of a committee of independent regulators (CESR) and after the approval by a committee of high level representatives of member states (the European Securities Committee);

– Level 3: joint recommendations, consistent guidelines and common standards issued by CESR regarding matters not specified by EU legislation to improve consistent implementation of Community legislation; and

– Level 4: enforcement of Community law through Commission action.

17. Working within the new *modus operandi*, the Commission required CESR to provide technical advice on Level 2 implementing measures in what concerns the proposed directive. I would like to draw the attention to the appropriate level 2 measures in the context of the current proposal before the European Parliament and the Council of Ministers. With our proposals for level 2 implementing measures, CESR is aware that there is also a level 3 to allow for regulatory standards to ensure uniform implementation of the EU legislative framework that consists of level 1 and 2 measures. Nevertheless, in accordance with the Provisional Request, it should be emphasized that our Paper is confined to issues relating to Level 2 implementing measures and, therefore, answers should be focused on the appropriate content of these Level 2 measures.

18. CESR relies on the European Commission to inform it of relevant developments at level 1 in so far as they affect the Provisional Request. If any relevant developments at level 1 arise during this consultation, CESR will inform those developments with the identification of their respective impact on the proposals contained in our Paper. Illustrating this specific context, please note that the recent amended proposal for the Directive, published by the European Commission on August 2002, has already been taken into account for the purpose of finalizing this consultative Paper.

19. The Paper covers three substantive areas, as defined in the provisional request, which are:

- Minimum Information
- Incorporation by reference
- Availability of the prospectus.

20. The admission prospectus directive of 1980 and the public offers directive of 1989 have been essential to the implementation and competitiveness of the European financial market. To achieve an effective securities market regulation by the end of 2003, as required by the Stockholm European Council, we must work fast to adopt a common European approach in order to reach a competitive and successful market within the international financial market.

21. To provide our technical advice on Level 2 implementing measures within the tight time limits we must highlight the importance of the previous work done by FESCO.

22. This Consultation Paper does not express CESR's final position. A productive consultation with the comments of all experts (users and participants) to the impact of the proposals made, presenting their advantages and disadvantages, will result in a more supportive quality advice from CESR. Our main objective is to work together in order to achieve an effective and competitive European

market. Bearing this in mind, we invite all to contribute with their own experience on the impact of the proposals established in this paper and advance with any other suggestions.

23. CESR has identified several questions to encourage the debate on areas where we expect your expert advice.

The Consultative Working Group

24 In undertaking its work, CESR is assisted by a Consultative Working Group (CWG) of experts drawn from a broad range of market participants. The group operates under the terms of CESR's Public Statement of Consultation Practices (Ref. CESR/01-007c). The members of the Group are the following: Ann Fitzgerald, Wolgang Gerhardt, Daniel Hurstel, Pierre Lebeau, Lars Milberg, Victor Pisante, Regis Ramseyer, Kaarina Stalberg, Torkild Varran, Stefano Vincenzi, Jaap Winter.

25 The CWG has met with CESR once and members of it were asked to comment on a certain number of specific issues and then on a first draft of this paper. The CWG meeting with the Expert Group took place in Lisbon on 10 September 2002. Contributions submitted by several members of CWG have been considered in preparing this document.

PART ONE - MINIMUM INFORMATION

Extract from provisional request

26. According to Paragraph 2.1 of the Provisional Request, CESR is asked to *"provide technical advice on possible disclosure requirements based on the basic structure and typical main features of different types of securities ("building block approach") involving at least the following types of transferable securities:*
(1) Shares: shares in companies and other securities equivalent to shares in companies which are negotiable on a regulated market;
(2) Bonds: bonds and other forms of securitized debt which are negotiable on a regulated market;
(3) Any other securities normally dealt in giving the right to acquire transferable securities under (1) and (2) by subscription or exchange or giving rise to cash settlement, excluding instruments of payment.

"This list may need to be amended as discussions evolve in Council and Parliament.

"The draft schedules should take account of the different categories of issuers, investors and markets: thus, for example, the schedules, where necessary, should include specific provisions for newly created issuers ("start ups"). In particular, DG Internal Market is seeking CESR's advice on disclosure requirements adapted to issuers who are small or medium-sized companies (SMEs).

"The draft schedules should be structured respecting the new format of the prospectus (registration document, securities note and summary note).

"The draft schedules should be based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and the existing schedules of the Directive 80/390/EEC[1]. The elements concerning the financial information should be in line with the EU accounting strategy and international accounting and auditing standards. DG Internal Market seeks in particular CESR's advice as to the scope and contents of the annual updating of the registration document."

Introduction

27. CESR has tried to keep as close as possible to the principles laid down in the Provisional request. Accordingly, its work has been organized on the basis of the following principles:

    (1) the draft schedules are based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial

listings (Part I) and on the existing schedules of the Directive 80/390/EEC which has been replaced by Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;

(2) the draft schedules are based on the new format of the prospectus (registration document, securities note and summary note);

(3) the building block approach has been followed.

28. It is important to note that the definitions in the proposed Prospectus Directive for equity securities and other securities, such as debt securities, are the subject of ongoing discussions in the Council Working Group. However, solely for the purposes of this consultation paper, the terms "equity security" means "shares and other securities equivalent to shares" and the terms "debt security" means "bonds and other forms of securitized debt".

29. Commission officials have confirmed to the CESR working groups that "*based on IOSCO Disclosure standards*" means that IOSCO Disclosure standards should be treated as the minimum requirements and CESR should consider whether additional disclosures or clarifications are required. This point is under discussion in the Council and Parliament. Clearly this approach has been of most application to equity securities, as the current IOSCO disclosure standards only apply to equity securities. In the future, CESR will have to reflect any published IOSCO Disclosure standards for debt and other securities.

30. Concerning the second and third principles, CESR points out that, due to the new format requirement, it has prepared provisional drafts both for registration documents and securities notes. In effect the IOSCO Disclosure standards have been split between the registration document and the securities note. These draft disclosure requirements need to be completed by specific blocks, which are not ready yet because of the extremely tight schedule. The papers attached to the present consultation will therefore need to be completed as the Expert Group develops new specific building blocks. More details on the approach followed by the drafting groups are available in the specific paragraphs concerning both the registration document and the securities note.

31. For obvious practical reasons, the draft summary will only be developed when an agreement is reached on both the registration document and the securities note.

32. In the following sections, CESR seeks advice on the different sets of documents which have been developed for the registration document and the securities note. There is however an issue that affects both the registration document and the securities note.

International Accounting Standards

33. According to the Regulation of the European Parliament and of the Council on the application of the IAS approved on the 7th June 2002:

(i) For each financial year starting on or after the 1st of January 2005, the consolidated accounts of all EU companies whose securities are admitted to trading on a EU regulated market should be prepared in accordance with International Financial Reporting Standards (IFRS) (Article 4) (subject to transitional provisions for bond issuers and US GAAP users- Article 9);

(ii) Member States may permit or require (Article 5):

- the EU companies with securities admitted to trading on a regulated market to prepare their annual accounts in conformity with IFRS;
- other companies to prepare their consolidated accounts and/or their annual accounts in conformity with IFRS.

34. Thus, on the basis of the above provisions, after the 1st of January 2005, the following scenario can be envisaged:

Prospectuses relating to public offerings

35. If no special provisions are given by the Member States, the issuer may prepare its annual and consolidated accounts not necessarily in conformity with IFRS before the public offer, but only in accordance with the relevant Council Directive. Since no admission to trading on a regulated market is sought, the issuer may continue to prepare its annual and consolidated accounts according to the provisions given by its Member State.

Prospectuses relating to the admission of securities to trading on regulated market

36. If no special provisions are given by the Member States, the issuer may prepare its annual and consolidated accounts not necessarily in conformity with IFRS, but only in accordance with the relevant Council Directives. As a consequence, the financial statements included in the prospectus, in the case of an application for admission to trading, could have been prepared according to accounting principles different from the IFRS.

37. Considering that the issuer should apply IFRS in its consolidated accounts after its admission to trading, it would seem sensible that its consolidated financial statements (included in the prospectus) for the previous year or possibly two years be restated or reconciled according to IFRS. This would

ensure the high level of transparency and comparability of the company's financial reporting, which is, according to European Regulation, a necessary condition for building an integrated capital market which operates effectively, smoothly and efficiently.

Conclusion

38. The whole area of IFRS is being considered by CESRfin in a Consultation Paper [*Statement of Principles – Definition and methods of enforcement* ref. no. CESR/02-188]. When CESRfin has reached its final conclusion, this issue will be considered again in relation to prospectus disclosure obligations.

A. REGISTRATION DOCUMENT

EXPLANATORY TEXT

Methodology

39. The rationale for having the concept of a registration document, is that issuers should produce a document that contains all the necessary information about the issuer. This information will have to reflect the nature of the issuer and it will therefore be appropriate to have different information provided by different types of issuers.

40. The building block approach allows the prospectus to be produced from various sets of disclosure requirements. The intention is to have a Core Equity building block for all issuers of equity. But there will also be building blocks that relate to certain specific types of issuers. These blocks will be required due to the specific nature of the issuer itself, or the nature of the business activities conducted by the issuer. Such specialist building blocks should only be required when the Core Equity building block is not capable of capturing all of the information that would be needed by investors to make an informed investment decision.

41. The IOSCO Disclosure standards apply to issues of equity securities (as defined in IOSCO IDS). CESR considered their direct application to issues of debt securities and other securities (such as derivatives). CESR concluded that it could not assume that the disclosure standards applicable for issuers of equity would automatically be the same as for issuers of debt securities. CESR has considered both the IOSCO Disclosure standards and those contained in the working paper produced by FESCO (FESCO/01-045 of July 2001) which set out some proposals for disclosures to be made in respect of retail bonds (i.e. bonds aimed at both retail and wholesale investors). According to the text of the amended Commission's proposal for the Prospectus Directive (art. 7, paragraph 1, letter b) a distinction in minimum

information requirements should be provided for prospectuses concerning the admission to trading on a regulated market of non-equity securities having a denomination per unit of at least EUR 50.000.

42. In relation to derivatives and other security types falling outside the definition of shares and bonds set out in the mandate, there was even greater doubt that IOSCO Disclosure standards would be of direct application. A more high level approach has therefore been taken in order to set terms of reference for future work.

EQUITY SECURITIES

43. The IOSCO Disclosure standards are of direct application to equities and it will therefore be no great surprise that the Core Equity building block for equity issuers draws heavily on those disclosure standards. The Core Equity building block is contained in Annex "A". Various issues have arisen on this Core Equity building block.

QUESTION

44. *Do you agree with the disclosure obligations set out in Annex A?*

Risk Factors

45. CESR felt that including a list of specific risk factors in the disclosure requirements could lead to difficulties. A list of factors that was "hard-wired" into the disclosure requirements could be seen as an exclusive list rather than an illustrative list. It also seemed slightly odd to include an illustrative list in a disclosure requirement. There will inevitably be circumstances that required disclosure of a particular risk factor that fell outside the illustrative list. Such an approach is sensible for a set of general standards, but seemed incongruous for a set of legislative requirements that have to be met.

46. CESR decided that a better approach would be to have a disclosure requirement for risk factors. But that CESR would later produce guidance on the sort of risk factors that might be expected to be included under this disclosure requirement. This guidance would be amended in the light of experience and future developments in the market.

QUESTION

47. *Do you agree with this approach?*

Pro forma information

48. In specific circumstances, as explained in the subsequent paragraphs, companies are used to publishing results or other financial data on the basis of methodologies different than that of Generally Accepted Accounting Principles (GAAP). These types of statements are often referred to as "pro forma" financial information. The release of non GAAP financial information raises obvious investor protection concerns. If not prepared with due care, pro forma statements might confuse or even mislead investors, for example by hiding or disguising GAAP results or by highlighting only the favourable items. Notwithstanding this, pro forma financial information can be very useful for investors if accompanied of cautionary warnings and disclosures about the assumptions the information is based on and how it compares with GAAP results.

49. In particular, CESR considers that pro forma financial information should be required in case of a significant gross change in the size of a company, due to a particular actual or planned transaction (with the exception of those few situations where merger accounting is required).

50. "Significant gross change" should be read as meaning a variation of more than 25% relative to one or more indicators of the size of the issuer's business. For example the indicators might include consolidated (or unconsolidated if there is no group), total assets, turnover or earnings or the consideration (under a broad definition) of the transaction compared to market capitalisation prior to the transaction. The figures used to make this assessment should be extracted from the preceding financial year's audited figures (unless the calculations using this data produce an anomalous result, when the Competent Authority may substitute other relevant indicators of size). Pro forma financial information should normally also be required when several related gross changes, during the 12 months prior to the latest transaction, when taken aggregated result in a total change of more than 25% in one of the above mentioned indicators.

QUESTIONS

51.	*Do you agree that pro forma should be mandatory in case of a significant gross change in the size of a company, due to a particular actual or planned transaction?*
52.	*Do you agree that pro forma financial information should also be required in all cases where there is or will be a significant gross change in the size of a company?*

53.	*Do you agree that 25% is the correct threshold figure? Would a different figure, say 10%, be more appropriate?*

54. The competent authority of the home country should be able, pursuant to Articles 5 and 21 of the proposed Prospectus Directive, to insist on pro forma financial information being included even if the above mentioned criteria are not met. However, this should only be possible where there has been a transaction or a transaction is planned and the provision of pro forma financial information would be material to investors (i.e. in order to satisfy the general requirement that all material information is included in the prospectus).

QUESTION

55.	*Do you agree that the competent authority should be able to insist on pro forma information being included where this would be material to investors?*

56. Pro forma financial information substantially contributes to investors' better understanding of the structural changes to a company. For this reason, it must be prepared with due care and reflect in the most accurate manner possible the genuine belief of the management as to how the accounts of the group (or where relevant the company) might have been presented had the restructuring occurred either in the past or in the future.

57. However, it is also vital that readers of prospectus should be absolutely clear as to the nature of any pro forma financial information presented and of its purpose. To achieve this, any pro forma financial information should be prefaced by an introductory explanatory paragraph that states in clear terms the purpose of preparing the information. The reader should then be warned that the information prepared is for illustrative purposes only and therefore may not give a true picture of the company's financial position or results. In addition, the actual historical financial information should be given greater prominence in the document containing the pro forma information.

58. This statement should make it clear that the information is intended to show the reader how the transaction might have affected the company's historic or forecast financial information had it been undertaken at the beginning of the period being reported on. In the case of a pro forma balance sheet or net asset statement it should be at the end of that period. It should be clear that it does not show what the company's position would have been or will be after the transaction has been completed. The publication of such information is permitted by a number of jurisdictions, including the USA. It is therefore

important to have a standard format for pro forma information which would allow easier pan-European comparison. For example, a columnar approach could be used which separately identified the unadjusted information (normally that of the company), the pro forma adjustments (normally the target or other transaction specific adjustments) and the resulting pro forma financial information in the final column.

59. More consistent quality of the financial information presented in the pro forma statement can be achieved by restricting the financial periods for which pro forma financial information may be presented. The source of that information should be restricted to previously published final or interim financial statements or previously published pro forma financial information. However, when the previously published information is not directly applicable (especially in case of spin off or merger; e.g. if the operation is conditioned by the sale of activities that are not part of the future core business), pro forma financial information may be based on other than published information, in order to provide investors with the best understanding of the new company (ies).

60. The only allowable adjustments should be those directly relevant to the transaction concerned and should not relate to future events or decisions. Adjustments should also be factually supportable.

61. The existence of an independent report made by an auditor, which can be the company's auditor, on the pro forma financial information provides readers of the prospectus with a level of comfort that a certain level of due diligence has been undertaken on the issues specifically referred to in the report. The company's reporting accountants should provide an opinion as to whether the information has been properly complied on the basis stated and, to ensure consistency and comparability, in accordance with the accounting policies of the company.

62. In order to ensure harmonization of pro forma information the core definitions relating to pro forma as well as appropriate pro forma adjustments and presentation as well as instructions concerning auditor's review should be adopted.

63. The disclosure requirements relating to pro forma information are set out in Annex "B". These would form part of the disclosure requirements set out in CESR reference VII.G.1 of Core Equity Building Block (Annex "A").

QUESTIONS

64.	*Do you agree with the disclosure requirements in respect of pro forma financial information as set out in Annex B, in particular with the obligation of an independent auditor's report?*
65.	*Would it be more appropriate to restrict the disclosure of pro forma information to the occasions where securities are being issued in connection with the transaction and hence require pro forma information in the securities note?*

Profit Forecasts

66. Profit forecasts and other future prospects are a controversial issue. On the one hand, if prepared with due diligence and on well-founded basis, these forecasts and prospects may help investors to make a reasoned assessment on the issuer and the expected economic profit relating to it. On the other hand, the profit forecasts and other disclosed future prospects may, in the worst case, be even misleading. In addition, prospects and profit forecasts disclosed in a prospectus are linked to the requirements of regular reporting and ad-hoc disclosure, especially when because of subsequent events or decisions the prospects or forecasts prove to be wrong or outdated.

67. Being material for the investors' assessment of the proposed investment, any forecast given in connection with a public offer or admission to trading (e.g. on a road-show) will also have to be disclosed in the prospectus. Regardless of whether the issuers are currently tapping the market, they are encouraged to disclose their forecast in the prospectus, while this kind of information will allow easier evaluation of the fairness and accuracy of the forecast and will facilitate comparability with actual results of the company. However, due to the potential risk of the information being misleading, certain regulatory limits are considered to be needed for disclosing this kind of information.

68. CESR believes that quantitative information about a company's level of profits at the end of the current financial year would be beneficial for investors. Accordingly, CESR proposes to allow this kind of disclosure in prospectuses, with the scope and limits set out below. Alongside these voluntary quantitative projections, disclosure of known trends or other factual data with material impact on the issuers' prospects should continue to be mandatory.

69. The future prospects of the company must be given for at least the current financial year. Assessments of future prospects must be clearly distinguishable

from any other information, such as details of the issuer's business strategies, general business aims and the future outlook for the industry concerned. When general assumptions underlying the future prospects are disclosed, the shareholders and potential investors may themselves evaluate the validity of the prospects. In addition to future prospects, an explicit (or implicit) profit or loss forecast may be given.

70. While profit forecasts are considered voluntary, issuers should be able to stop making forecasts or to resume such forecasts after having ceased to make them. However, the disclosure policy of profit forecasts and other numeric projections should be consistent from time to time. Thus, issuers are expected to provide an explanation of any changes in disclosure policy when updating the prospectus.

71. A common definition of what constitutes a profit forecast is needed, so that companies and shareholders can be sure that the same statement made by the directors of the company will be interpreted in the same way in whichever jurisdiction it is made.

72. In accordance with FESCO 01-045 (paragraph III.11) a profit or loss forecast could be defined as a form of words which expressly or by implication states a minimum or maximum for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that, or contains data from which a calculation of an approximate figure for future profits or losses may be made, even if no particular figure is mentioned and the word "profit" is not used. A dividend forecast must be treated as a profit or loss forecast where the company has a known policy of relating dividends to earnings, or has an insufficient level of retained earnings or the forecast otherwise implies a forecast of profit. A profit or loss estimate is also defined as above with a difference that it covers a financial period which has expired but for which the results have not yet been published..

QUESTION

73.	*Do you have any comments at this stage about this preliminary definition of a profit forecast?*

74. Estimates concerning future prospects may also be given by disclosing for example the market share, net sales, earnings per share, capital expenditures and other financial figures (e.g. EBITDA). Quite often issuers use this kind of estimates instead of exact profit forecast and investors will have to make their own assessment of the issuer's economic profit based on these various estimates. Obviously, the same qualifications attached to profit forecast should also apply for the other kind of projected items that might be presented in a separate way.

75. There are obvious hazards attached to the forecasting of profits for any extended period; this should in no way detract from the necessity of maintaining the highest standards of care in the preparation of such information. Any forecast published by an issuer must not be misleading, false or deceptive nor omit anything likely to affect the import of such forecast. As set out in FESCO 01-045, it would also be necessary to adopt a common set of disclosure requirements that issuers will have to comply with if they want to include a forecast in an admission or offering prospectus.

76. The first requirement refers to the period for which forecasts can be made. Companies should be restricted to making a forecast which is co-terminus with its own reporting period. Projections may also easily vary during the given period, following changes in the factors on which they are based. Therefore, a statement of the principal assumptions, for each factor which could have material effect on the achievement of the forecast, is required.

77. Also in order to ensure comparability, the profit or any other quantitative forecast should be prepared on a basis comparable with a number reported in its audited financial statements, so as forecast can be easily compared with both historical information and the next set of audited accounts. The disclosure policy of these forecasted items should be consistent. Moreover, in case of disclosure of a non GAAP item (e.g. EBITDA) the company will have to provide the formula employed to reach the figure.

78. Moreover, in order to allow a reasoned assessment for the investors, the forecast information should also specify particular risk factors possibly affecting the provided forecast and prospects. The cautions must be specific to each assumption. Such risk factors are for example special matters that typically pertain to the issued security, issuing company or the industry in which the company is operating. This information should be given in accordance with the disclosure requirements set out in CESR reference II.B of Core Equity Building Block (Annex "A").

79. In addition, any profit forecast should be accompanied by a statement ensuring that said forecast has been properly prepared on the basis stated and that the basis of accounting is consistent with the accounting policies of the company.

80. Contrary to paragraph III.13 of FESCO 01-045, the company's financial advisor (or any external expert accepted by the competent authority) should not be required to report on the forecast or estimate. Even though this kind of independent scrutiny could help to maintain the quality of the information being presented to shareholders, particularly bearing in mind the wide range of subjective judgments made in preparing such forward looking information, it would cause extra costs for the company. While assumptions underlying the forecast are disclosed, the shareholders and potential investors may themselves

evaluate the validity of the forecast, and thus an adequate level of investor protection is considered to be reached. Besides, the assumptions supporting the forecasts are exclusively in the hands of the issuer, and accordingly, the level of comfort that an external review could provide would be always limited.

81. In order to ensure the highest standards of care in the preparation of such information, CESR deems necessary the involvement of the issuer's management at the top level. For example, profit forecasts and estimates could be reviewed by the management board, Audit Committee or some other board level committee. In addition to that, the company could also voluntarily decide to subject the forecasts and estimates to an outside reviewer.

82. If subsequent events or decisions prove the forecasts to be wrong, a listed issuer is obliged to update the information under requirements of regular reporting and ad-hoc disclosure. In addition, if these events or decisions occur before the closure of the offer or the admission to trading, the issuer is obliged to supplement the prospectus in accordance with the Prospectus Directive.

83. When the issuer updates its prospectus as provided by the Prospectus Directive, there will have to be a comparison between the forecast and the actual results of the company.

84. Finally, when the issuer has published an ad-hoc profit forecast for a financial period that is not yet complete and subsequently publishes a prospectus it would be possible to require the issuer to repeat or update the forecast in the prospectus.

QUESTIONS

85.	*Should issuers be required to repeat or update outstanding ad-hoc profit forecasts in the prospectus?*
86.	*Do you agree with the disclosure requirements in respect of profit forecasts set out in disclosure requirement CESR reference IV.D.3 (a) and (b) of Core Equity Building Block (Annex "A")?*
87.	*Do you agree with the arguments set out regarding mandatory reporting by the company's financial advisor?*

Directors and senior management privacy CESR reference V.A of Core Equity Building Block (Annex "A")

88. IOSCO Disclosures VI.A.1-5 propose requirements to provide information about the previous history of directors. Most of CESR members deem it necessary to add some disclosure requirements relating to details of fraudulent offences, previous bankruptcies and/or public criticisms (see Annex A – CESR reference V.A.1 4th subparagraph). There is a balance to be struck between the rights of investors to know details about the senior management of the company in which they are investing and the right of privacy for the senior management. This disclosure requirement, as highlighted by several members of the CWG, seems to be particularly relevant to the case of start-ups.

QUESTION

89.	*Do you agree that such information may be material to an investor's decision to invest? Would the provision of such details breach privacy laws in your jurisdiction?*

Controlling shareholders CESR reference VI.A.2 of Core Equity Building Block (Annex "A")

90. Companies may issue shares to other investors when there is a shareholder who effectively controls the company. This situation could be dealt with by simple disclosure of that fact. Investors then know what they are investing in and cannot be surprised if that controlling shareholder takes action which they do not agree with but can do nothing about. Alternatively, the company could be required to disclose what measures had been taken to limit the degree of control operated by the controlling shareholder, or disclose that there are no such measures in place.

QUESTION

91.	*Do you think that the additional disclosures of any limiting measures should be required?*

Documents on Display

92. There has been a different approach between CESR members to the requirement to put documents on display. Some believed that the list of documents set out in paragraph 3.1 of Chapter III, Schedule A of the Directive 2001/34/EC limited the scope of paragraph 3.1.5 to the same type of documents. Others had interpreted this to mean all documents concerning the issuer that were referred to in the listing particulars should be put on display.

If these documents contained commercial information, those competent authorities would allow these details to be excluded or hidden.

QUESTION

93.	*Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?*

Specialist Building Blocks

94. CESR was under an obligation to reflect the "*different categories of issuers, investors and markets"* and in particular disclosures relevant for start-up companies and Small and Medium sized Entities (SMEs). CESR has therefore considered specialist building blocks for the registration documents of Start-up companies, SMEs, Property Companies, Mineral Companies, Investment Companies and Scientific Research Based companies. Other specialist building blocks may be considered such as those for shipping companies.

QUESTIONS

95.	*Do you believe that the building blocks in Annexes D, E, F, G and H are appropriate as minimum disclosure standards?*
96.	*What other specialist building blocks (if any) should CESR consider producing in the future?*

Start-up Companies

97. In the case of an issuer without a three year trading record in the sphere of the actual economic activity conducted by the company, the registration document should meet the disclosure requirements set out in the Core Equity building block. However, these disclosure requirements should be amended in accordance with the following paragraph. In addition, such an issuer should provide the additional disclosures set out in the specific building block for start-up companies shown in Annex "C".

98. If the issuer has existed as an enterprise for less than three years, the CESR Core Equity building block requirements, III.C (Business overview), IV.C (Research and Development, Patents and Licenses etc.), V.D (Employees), VII.A (Related Party Transactions), VI.B (Consolidated Statements and Other

Financial Information), VIII.A.7 (History of share capital), VIII.C (Material Contracts) shall be given for the period of its existence, rather than for three years.

99. CESR also considers that there will be risk factors that will need to be disclosed which are specific to this type of issuer. For example, an indication of the name of any key qualified executive/employee/advisor which is considered necessary by the company to carry out its strategy of development of its business.

QUESTIONS

100.	*Do you agree with the specific disclosure requirements set out in the building block for start-up companies?*
101.	*Do you feel that additional disclosure requirements should be included, for example, an independent expert opinion on the products and business plan?*
102.	*Do you feel that disclosure of restrictions regarding holdings by directors and senior management etc should be applied to all companies through the core building block? Or should this only be required for all companies where there are such restrictions?*

SMEs

103. CESR considered the position of SMEs in relation to the disclosure requirements for the registration document, according to the provision of article 7, paragraph 1, letter (e) of the Commission's amended proposal for the Prospectus Directive that invites CESR to take account of the size of the issuer when developing the different models of prospectus. A number of the disclosure requirements contained in the Core Equity building block were identified as potentially burdensome for SMEs. However, the CESR Core Equity building block requirements on occasion have a reference to materiality. In particular, disclosures II.B, IIIC.4, III.C.5, III.C.6 refer to materiality and if this information is not material for an SME then it will not need to be supplied or perhaps only partly supplied. Bearing this in mind, CESR considers that with the possibility of one exception, there should be no specific disclosure model for SMEs in relation to the registration document.

104. Some CESR members thought that the costs of providing selected financial data for three years imposed an unreasonable burden on SMEs. They felt that this could be reduced to two years. Several members of CWG expressed the

view that there is no need for a special disclosure regime for SME's if they are admitted to trading on a regulated market.

QUESTIONS

105.	*Do you believe that SMEs should only be required to provide details for two years under disclosure requirement II.A?*
106.	*If so, do you believe that all historical information should be restricted to this two year period?*
107.	*Bearing in mind the materiality tests in the disclosure requirements contained in the Core Equity building block, if you believe that there should be some specific disclosure requirements for registration documents for SMEs, please list them.*

Property Companies

108. CESR felt that property companies gave rise to issues that required a specific building block. For these purposes a property company would be defined as:

> "a company primarily engaged in property activities including the holding of properties, both directly and indirectly and development of properties for letting and retention as investments, the purchase or development of properties for subsequent sale or the purchase of land for development of properties for retention as investments. "Property" means freehold, heritable or leasehold property or any equivalent".

109. CESR considered that the prospectus for a property company would not provide all the information necessary for investors to make an informed investment decision if the prospectus did not include a valuation report. The requirements in respect of the valuation report are set out in Annex "D".

110. However, CESR also considered when such a valuation report would be of most use to investors. CESR concluded that it would be of most use to investors when securities were being issued. On the assumption that companies will generally prepare their registration documents at the same time as their annual accounts, there seemed no compelling reason to provide valuation reports in addition to the annual accounts. Therefore CESR considers it appropriate for such valuation reports to form part of the securities note for property companies.

QUESTIONS

111.	*Do you agree that valuation reports as set out in Annex D should be required for property companies?*
112.	*Do you consider it appropriate that the date of valuation must not be more than 42 days prior to the date of publication?*
113.	*Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a property company and hence should form part of the securities note?*

Mineral Companies

114. Mineral companies can give rise to specific issues that would not be sufficiently explained in the disclosures required in the Core Equity building block. CESR has therefore produced a specialist building block for these companies. For the purposes of this building block, a mineral company is:

> "a company whose principal activity is, or is planned to be, the extraction of mineral resources. Companies that are involved only in exploration for mineral resources and are not undertaking or proposing to undertake their extraction on a commercial scale would not be classed as mineral companies".

115. For similar reasons as those relating to property companies, CESR believes that an expert's report should be required in relation to mineral companies that have not been operating for at least three years. After that time the company will have sufficient trading history available that investors will not have to rely upon the sort of information that would otherwise be contained in an expert report. However, this report would also be of most use to investors at the time securities were being issued. CESR has therefore prepared two specialist building blocks in relation to mineral companies; one for the registration document (Annex "E") and one for the securities note (Annex "F").

QUESTIONS

116.	*Do you agree that expert reports should be required for mineral companies? Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a mineral company and hence should form part of the securities note?*
117.	*Do you agree with the disclosure requirements in registration documents for mineral companies set out in Annex "E"?*

Investment Companies

118. CESR has considered the situation of investment companies. CESR has concluded that there should be a specialist building block for such companies. For the purposes of this building block an investment company is :

> "a company (which is not an open-ended investment company) whose object is to invest its funds wholly or mainly in investments with the object of spreading investment risk. Investments include shares or stock in the share capital of a company (excluding an open-ended investment company), instruments creating indebtedness such as debentures and government bonds, warrants, options, futures, contracts for differences and certificates representing securities".

119. The specialist building block setting out the additional disclosure requirements over and above the Core Equity building block is shown in Annex "G".

QUESTION

120.	*Do you agree with the disclosure requirements in registration documents for investment companies set out in Annex "G"?*

Scientific Research Based Companies

121. Scientific research based companies present novel features that CESR considers cannot be adequately captured by the Core Equity building block. For the purposes of this building block, scientific research based companies are:

> "companies which are primarily involved in the laboratory research and development of chemical or biological products or processes, including pharmaceutical companies and those involved in the areas of diagnostics, agriculture and food".

122. The specialist building block setting out the additional disclosure requirements over and above the Core Equity building block is shown in Annex "H".

QUESTION

123.	*Do you agree with the disclosure requirements in registration documents for scientific research based companies set out in Annex "H"?*

DEBT SECURITIES

Introduction

124. CESR envisages that a registration document for equity that already exists could be used by the issuer to meet its disclosure obligations in relation to an issue of other securities including debt securities. Despite this, CESR decided to approach the question of disclosure requirements for debt securities from first principles. In general, the interests of investors in equity and the interests of investors in debt securities will have different focuses. The investor in equity will be more interested in the income stream from the shares and the capital growth of the company (and hence the value of the shares). An investor in debt securities will be primarily interested in the risk that the income stream and/or the capital will not be repaid. Greater capital growth may reduce the risk of default, but will not necessarily increase the return to the investor. These investor interests are likely to be most closely aligned when the issuer of the debt security is also an equity issuer. CESR decided to start its work by considering the disclosure requirements for corporate retail debt securities (as defined in the following paragraphs).

125. This choice was also partly driven by the disclosure requirements already developed elsewhere. The IOSCO Disclosure standards apply to equity securities. The published FESCO proposal related to retail debt. It was thought possible that the disclosure requirements for issuers of such securities would be very similar, or even identical, to the disclosure requirements for an issuer of equity.

126. In any event the disclosure requirements for such securities would represent the "high-water" mark for disclosure requirements for debt issuers. Debt securities aimed at wholesale market investors (see article 7, paragraph 1, letter (b) of the Commission's amended proposal for the Prospectus Directive) and those issued by special purpose vehicles may require different detailed disclosure requirements to those of corporate retail debt.

127. The disclosure requirements for these other types of debt securities and issuers will be published for consultation at a later date. Likewise structured debt instruments such as asset backed securities, mortgage backed securities and other types of securitisations and convertible bonds will be covered in the next consultation.

128. It should also be noted that this consultation paper does not address the disclosure requirements for the base prospectus which is now a feature of the amended version of the Prospectus Directive.

QUESTION

129.	*Do you consider that the disclosure requirements for debt securities should be identical to those for equity, as set out in Annex A?*

Definition of corporate retail debt

130. There are many different types of instrument that fall within the definition of "debt". For the purpose of this consultation paper, references to corporate retail debt should be construed as relating to instruments where :

> "The security is aimed at both retail and wholesale investors and the issuer has an obligation arising on issue to pay the investor 100% of the investor's capital "the capital return element", in addition to which there may also be an interest payment."

The disclosure requirements for corporate retail debt

131. The detailed disclosure requirements for retail corporate debt are set out in Annex "I", CESR sets out below a discussion about some of these areas of disclosure.

Disclosure about the advisers of the issuer – CESR disclosure ref: I.B (Corporate Retail Debt Building Block)

132. The IOSCO disclosure standard about the company's principal advisers, has in Annex "I" been duplicated for the corporate retail debt registration document disclosure requirements. As can be seen, this disclosure requirement requires disclosure about the company's principal bankers and legal advisers to the extent that the company has a continuing relationship with such entities.

133. Although CESR considers that such disclosure is relevant for the purposes of an investor in the company's equity, CESR has debated the relevance of this level of disclosure about the company's bankers and legal advisers for the purposes of making an investment decision about corporate retail debt. Regardless of who these bankers or advisers are, the investor is making an investment decision about the issuer's solvency and as such its ability to repay its obligation to the investor.

QUESTIONS

134.	*Do you consider disclosure about the issuer's bankers and legal advisers to the extent that the company has a continuing relationship with such entities to be relevant for corporate retail debt?*
135.	*Do you consider that disclosure relating to the bankers and legal advisers who were involved in the issue of that particular debt instrument to be relevant?*

History of the company's investments – CESR ref: III.B (Corporate Retail Debt Building Block)

136. As can be seen from Annex "I", the nature and extent of a company's past, current and future investments in other undertakings is a proposed disclosure requirement for corporate retail debt. Although CESR considers that such disclosure is relevant for the purposes of an investor making an investment decision about whether or not to invest in the company's equity, CESR has debated the relevance of this disclosure for an investor making an investment decision about investing in the debt of the company.

QUESTIONS

137.	*Do you consider disclosure about a company's past investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?*
138.	*Do you consider that disclosure about a company's current investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?*
139.	*Do you consider that disclosure about a company's future investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?*

Operating results, Liquidity and capital resources – IOSCO ref V.A and V.B

140. CESR has considered whether holders of retail debt need to receive all the disclosures provided under the above headings by the Core Equity Registration Building Block. The outcome of this consideration has been that only certain of such disclosures are deemed appropriate for the Corporate Retail Debt Registration Building Block, as set out in this document.

141. These differences reflect the different interests that investors in the company as shareholders have from those of investors in debt securities issued by the company.

QUESTION

142.	*Do you agree that these different interests should be reflected by different disclosure standards and in particular that retail bondholders do not need the same disclosures as shareholders in respect of these sections of the IOSCO IDS?*

Age of the latest accounts – CESR ref: VII.H.1 (Corporate Retail Debt Building Block)

143. The disclosure requirement set out in Annex " I" stipulates when the company is to include interim financial statements in the registration document.

144. In relation to this disclosure requirement, CESR has debated as to whether or not it is a useful and necessary requirement to stipulate in detail as set out in VII.H.2 of the CESR Core Equity building block what the nature and content of these interim financial statements should be.

QUESTIONS

145.	*Do you consider it necessary for a disclosure requirement that stipulates when interim financial statements should be disclosed in the registration document, to also stipulate what the form and content of these statements should be?*
146.	*If you consider that the reduced level of detail is more appropriate, should the same approach be taken for equity?*

Documents on display – IOSCO Ref X.H

147. As mentioned in respect of equities, there have in the past been different interpretations of the existing directive requirements that set out which documents concerning the issuer which are referred to in listing particulars should be put on display for inspection.

QUESTIONS

148.	*Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)?*

	Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?
149.	*On review of the list of documents set out CESR ref VIII.E of the corporate retail debt building block in Annex "I", please advise with reasons: (1) Whether or not there are any documents that are listed that you consider do not need to be put on display? (2) Whether or not there are any documents that are not listed that should be put on display?*
150.	*Please give views on which if any of the documents that are not in the language of the country in which the public offer or admission to trading is being sought should be translated.*

Additional information – IOSCO Ref: - X.I

151. In relation to IOSCO disclosure standard X.I (and paragraph 18 of Part II), which sets out the disclosure requirements that the company needs to make about its subsidiaries, the equivalent directive provisions that allow the competent authority to decide whether or not such disclosure needs to be provided on a case by case basis has in the past been used in different ways by different competent authorities. In the time available, CESR has found it difficult to reach a consensus as to what the nature of the disclosure requirements about the company's subsidiaries should be for debt securities.

152. For this reason, the retail corporate debt schedule does not set out any disclosure requirements for this IOSCO disclosure standard. CESR will do further work on what disclosures should be made. However, CESR would be interested in any views from others at this stage about these disclosures.

QUESTIONS

153.	*On a review of the equity disclosure requirements (CESR ref VIII.G of the Core Equity Building Block) set out in Annex "A", please advise which if any of these requirements you consider to be relevant for retail corporate debt. Please give your reasons.*
154.	*Do you agree with the CESR disclosure proposals for corporate retail debt as set out in Annex "I"?*
155.	*Please advise which if any items of disclosure should not be required for corporate retail debt. Please give you reasons.*

156.	*Please advise if there are any items of disclosure for corporate retail debt that are not set out in the schedule, but should be. Please give your reasons.*

DERIVATIVE SECURITIES

Introduction

157. The third category of securities that the Provisional Request for technical advice makes reference to is potentially very broad. CESR has therefore classified the third category of securities as derivative securities.

158. It has not yet been determined whether or not there is a need to have a separate registration document for derivative products. Due to the time scale within which this work needs to be completed CESR thought it would be useful to give some indication of its thinking in this area. This part of the consultation paper sets out a discussion about the possible terms of reference for future work on the contents of possible building block disclosure requirements for the registration document relating to these securities.

159. A further discussion about the registration document requirements for derivatives will be set out in the next consultation.

QUESTION

160.	*Do you consider it necessary to have specific derivative registration document requirements, or do you consider this unnecessary as the registration document requirements for debt securities should be used for derivative securities as well? Please give your reasons.*

Types of securities that are covered by the word "derivative"

161. The starting point in establishing what CESR's advice should be for these products is to establish what derivative securities are.

162. The directives being replaced by the Prospectus Directive did not deal with the prospectus disclosures required for these type of securities. So there has been no common definition as to what is meant by the use of the word "derivative", or what the fundamental features of these securities are.

163. The market has developed a number of different products and names for these products. For example, "covered warrants" "certificates" "reverse convertible notes", all of which have certain particular features – but these descriptions are not definitive and the nature of the instrument may vary depending on how the issuer structures that product and the term the issuer uses to describe it.

164. The derivatives market is an innovative market where new products are developed on an ongoing basis. As such, CESR's advice needs to be applicable to not only existing products but also to new products in this market, preferably without the need to change the definition set out in Level 2.

165. In order to ensure that irrespective of the names currently used to describe these instruments and to ensure that the advise is applicable to future products, CESR recommends that some form of definition is set out. Two possible approaches have been discussed and are set out below.

166. The first approach is to include a broad definition of such products, although this approach does have the risk of catching other categories of securities. Such a definition might be:

Derivative are securities which comprise forward transactions in the form of firm transactions or options transactions whose value/price directly or indirectly depends on

a) the exchange or market price of securities
b) the exchange or market price of money market instruments
c) interest rates or other returns
d) the exchange or market price of goods or precious metals, or
e) the forward exchange rates or units of account

167. The second approach would be to set out the fundamental features of these products so that, irrespective of what a security is called if it contains the features set out below it is classifiable as a derivative security. This classification would then determine the appropriate disclosure obligations for the security.

168. CESR's preliminary views on these fundamental features are:

1) The product derives its value from and is linked to some other product, the "underlying instrument"

2) The issuer of the underlying instrument is either :

   a) a third party and is not the issuer of the underlying instrument to which the derivative is linked; or

   b) the same as the issuer of the derivative security, where the security is not issued for the purposes of raising capital.

3) There is some form of payment payable by the investor to the issuer of the instrument upon which the investor may be entitled or obliged to :

   a) buy an underlying instrument or instruments at a pre-determined price (whether numerical or ascertained by formula) from the issuer;

   b) sell an underlying instrument or instruments to the issuer at a pre-determined price (whether numerical or ascertained by formula);

   c) receive a cash payment from the issuer calculated with reference to the performance of an underlying instrument or instruments.

   The investor's entitlement or obligation may involve any combination of (a)-(c) above.

4) The instrument will :

   a) give the investor rights – normally in the form of exercise rights, or

   b) give the investor an absolute entitlement or obligation under paragraph 3 above, or

   c) give the issuer the discretion to determine how it fulfils its obligations to the investor arising under paragraph 3 above.

5) The investor's return is either:

   a) wholly dependant upon the performance of the underlying instrument to which the product is linked; or

   b) the investor will receive some form of return from the issuer irrespective of how the underlying instrument performs and the investor may also receive an additional return that is dependent upon the performance of the underlying instrument

6) In addition to the above fundamental features the instrument may have trigger characteristics relating to the performance of the underlying instrument for example- caps, floors, knock in and knock out features that determines whether the issuer has any obligations to the investor.

169. With reference to point 2 of the previous paragraph, instruments that derive their value from underlying instruments where the issuer is the same as the issuer of the underlying instrument and the purpose of the issuer is to raise capital – for example when a company issues subscription warrants over its own shares – are not considered by CESR to fall within this third category of derivative securities . They would fall into either the debt or equity categories of instruments depending upon the nature of the underlying instrument. So, for example, if a company issued a derivative product over its own bonds for

the purpose of raising capital, this would be deemed to be a form of convertible bond and thus debt security disclosures would be more appropriate.

QUESTIONS

170.	*Do you think it is useful to provide some form of definition for these securities?*
171.	*If so, which of the two approaches set out above do you prefer? Please give your reasons.*
172.	*If you prefer the approach based on a wide definition of derivatives, do you have any comments on the proposed definition?*
173.	*If you prefer the approach based on fundamental features, are there other features that should be but are not included in the above list?*

Broad categorisation of derivative products in a building block approach

174. Any registration document building blocks that CESR may consider necessary to develop, need to be capable of covering a highly structured product range, where the issuer needs only to change the combination of fundamental features discussed above in order to create a new product.

175. As referred to before, the registration document contains the information about the issuer. The possible different registration document building blocks will need to reflect the different types of information that an investor needs about an issuer of the derivative instrument, in order to make an informed investment decision.

176. As a starting point in creating possible registration document building block requirements, CESR has categorised these products into two possible core registration document building blocks. These building blocks reflect the two sub- categories of these products:

(a) those products where the investor's return is wholly dependant upon the performance of the underlying instrument to which the product is linked. These types of derivatives can be described for the purposes of this consultation as "non guaranteed return derivatives"; and

(b) those products where the investor will receive some form of return from the issuer irrespective of how the underlying instrument performs.

The investor may also receive an additional return that is dependent upon the performance of the underlying instrument. These types of derivatives can be described for the purposes of this consultation as "guaranteed return derivatives".

177. Please note that the use of the word "guaranteed" in this context is not intended to mean that there is any third party guaranteeing any part of the return to the investor.

178. Irrespective of how the issuer structures a derivative product, all derivative products will fall into one of these two categories. The distinction between these two groups of derivative products could be important because the information that an investor requires about the issuer of these products in order to make an investment decision about investing in a non-guaranteed derivative product could be different to that information required to make an investment decision about investing in a guaranteed derivative product.

QUESTIONS

179.	*Do you agree with the above broad sub-categorisation of derivative products?*
180.	*Do you agree with the approach of having two distinct registration document building blocks to reflect this sub-categorisation?*

Non guaranteed return derivatives

181. "Non guaranteed return derivatives" offer the investors the opportunity to take a view on the way that an underlying instrument or instruments will perform over time.

182. An investors return is wholly dependent upon the performance of the underlying instrument to which the derivative is linked, and the investor is making an investment decision about the product on the basis of the underlying instrument and how the investor thinks it will perform in the future.

183. An investor needs to be able to make an assessment of the issuer's ability to fulfill its obligations under the terms of the products. But, whether or not the issuer has to fulfill any obligations to the investor for these types of derivative products is solely dependant upon the performance of the underlying instrument over time. The disclosure requirements in the registration document should reflect these aspects of the security.

Guaranteed return derivatives

184. ”Guaranteed return derivatives” are securities, where irrespective of the performance of the underlying instrument to which the derivative is linked, the issuer is obliged to make at least some form of return to the investor. Thus the assessment about the ability of the issuer to fulfill its obligations becomes more important than is the case for non guaranteed derivatives. Hence, more information about the issuer and its ability to fulfill its obligations should be disclosed in the registration document for guaranteed derivative securities.

QUESTION

185.	*Do you agree that the nature of the decision that an investor is making about the issuer in the case of a non guaranteed derivative is different to the one an investor is making in the case of a guaranteed derivative? Please give your reasons.*

The nature of the disclosure requirements that should be required in the registration document for derivative securities

186. On the assumption that derivative securities require a specific Registration Document and can be divided into the two broad sub-categories explained above, at this stage, CESR discussed the possibility that the non guaranteed derivative building block should be the core derivative registration document building block. This building block would then apply to all derivative products. The guaranteed return derivative building block would need only consist of disclosures about the issuer that reflects the more critical assessment about the issuer of the instrument that the investor is required to make.

187. It has not been possible in the time available to establish what the detailed disclosure requirements for the possible derivative registration document building blocks could be. As such CESR sets out below a discussion regarding the broad areas of the IOSCO disclosure standards that may or may not be applicable for these instruments, Annex “J” sets out the IOSCO disclosure requirements in full for ease of reference.

Directors and senior management- IOSCO ref: I.A

188. CESR considers that disclosure about the directors of the issuer is relevant disclosure for these products, but questions the appropriateness of requiring information about the issuer’s senior management to be disclosed, as this

information may not be useful in facilitating an investor's assessment of the issuer's ability to fulfill its obligations to it.

189. In addition, CESR considers that a statement regarding who is taking responsibility for the information contained in the registration document is relevant; and is an appropriate disclosure requirement for these products.

QUESTION

190.	*Do you consider that disclosure about the issuer's senior management, as set out in IOSCO reference I.A, is relevant for these products? Please give your reasons.*

Advisers- IOSCO ref I.B

191. CESR questions the appropriateness of requiring disclosure about the issuers advisers for these products in facilitating an investor's assessment of the issuer's ability to fulfill its obligations to it.

QUESTION

192.	*Do you consider disclosure about the issuer's advisers, as set out in IOSCO reference I.B, to be relevant for these products? Please give your reasons.*

Risk factors – IOSCO ref IIID

193. The detailed illustrative list approach has already been rejected for the equity disclosure requirements. It has already been proposed that CESR guidance on the type of risk factors that might be disclosed would be more appropriate. Following this approach the sort of risk factors that might be advised could include:

(a) The risks that relate to the issuer's ability to meet its obligations to the investor in terms of delivering the underlying instrument to which the derivative is linked or making a payment of cash and

(b) Those risks that affect the value and trading price of the derivative itself, which relate to the nature of the underlying instrument itself.

194. In addition, the nature of these risks should be set out in the specific risk factor section, with a risk warning on the front page highlighting the purchasing of

these instruments involves risks, with a cross reference to the page where the risks are discussed in detail.

QUESTIONS

195.	*Do you have any views at this stage about CESR's provisional guidance in this area?*
196.	*Are there any other sections of Key information section at section III of IOSCO that you deem as being relevant disclosure for these products? Please give your reasons.*
197.	*Are there any sections of key information section at section III of IOSCO you consider superfluous as regards the disclosure of these products? Please give your reasons.*

History and development of the company –IOSCO ref IV A.

198. CESR considers that information about the issuer of the derivative is relevant for these products, but questions the appropriateness of requiring the level of detail as set out in IOSCO disclosure standard IV.A for these instruments as the investor is not investing in the company in the same way as a shareholder, and as such this information may not assist an investor in making an investment decision as to whether or not to buy the derivative instrument that the issuing company is selling.

QUESTIONS

199.	*Do you consider the level of detail set out in IOSCO disclosure standard IV.A to be inappropriate for these products? Please give your reasons.*
200.	*Which particular items of IOSCO disclosure in this section do you consider to be relevant for these products? Please give your reasons*

Business overview – IOSCO ref I.V.B

201. CESR questions the appropriateness of requiring the level of detail about the issuer's business as set out in IOSCO disclosure standard IV.B for products where the investor is not investing in the issuer.

QUESTIONS

202.	*Do you consider that a general description of what the issuer's principal activities are is a more appropriate level of disclosure for these products? Please give your reasons.*
203.	*Please advise what, if any, other items of Section IV.B of IOSCO you consider to be of relevance for these products. Please give your reasons.*

Organisational Structure – IOSCO ref IV.C

204. CESR questions the appropriateness of the level of detail set out in IOSCO disclosure standard IV.C relating to the company's group structure for these products.

QUESTION

205.	*Do you consider that a brief description of the issuer's group and the issuer's position within it, as set out in IOSCO reference IV.C, to be an appropriate disclosure requirement for these products?*

Property, Plants and Equipment – IOSCO ref IV.D

206. CESR questions the appropriateness of this IOSCO disclosure standard for these products, as the investor is not investing in the company, and as such information about the issuer's property, plants and equipment may not assist an investor in making an investment decision as to whether or not to buy the derivative instrument.

QUESTION

207.	*Do you consider Section IV.D of IOSCO to be relevant disclosure for these products? Please give your reasons.*

Operating and financial review and prospects –IOSCO ref V

208. CESR questions the appropriateness of IOSCO disclosure standard V for these products.

QUESTIONS

209.	*Do you consider Section V.D of IOSCO to be relevant disclosure for these products? Please give your reasons*
210.	*Please advise what, if any, other disclosure requirements set out in Section V of IOSCO you consider to be relevant for these products. Please give your reasons.*

Directors, senior management and employees –IOSCO ref VI

211. CESR questions the appropriateness of the level of detail set out in Section VI of IOSCO about the directors and senior management of the issuing company, it's board practices and it's employees for these products

QUESTIONS

212.	*Do you consider that the name and function of the directors of the issuing company to be the appropriate level of disclosure for these products*?
213.	*Please advise what if any other items of Section V of IOSCO you consider to be of relevance for these products. Please give your reasons.*

Major shareholders and related party transactions – IOSCO ref VII

214. CESR questions the appropriateness of detailed disclosure about how the issuer is controlled for these products as set out in Section VII of IOSCO.

QUESTION

215.	*Do you consider that a statement setting out whether or not the company is directly or indirectly owned or controlled by another entity and the name of that entity to be the appropriate level of disclosure for these products?*

Financial information IOSCO ref VIII

216. CESR considers that information about the solvency of the issuer and its ability to meet its obligations to an investor is relevant for these products, but questions the appropriateness of requiring the level of detail set out in IOSCO disclosure standard VIII for these products.

QUESTIONS

217.	*At this stage do you have views about whether the following types of financial information about the issuer are relevant and as such should be disclosed in the registration document for these products? Please give your reasons.*
	a) balance sheet *b) profit and loss account* *c) statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners; or (ii) all changes in equity (including a subtotal of all non-owner items recognised directly in equity)* *d) cash flow statement* *e) accounting policies* *f) related notes and schedules required by the comprehensive body of accounting standards to which the financial statements are prepared.*
218.	*For how many years should the above disclosure be given?*
	a) for the last year, or *b) for the last two years.*
219.	*Do you think that there should be a disclosure requirement that the notes to the accounts be included in the registration document for these products? Please give your reasons.*
220.	*Please advise which (if any) of the other CESR disclosure standards set out in Sections VII.C-VII.I of the Corporate Retail Debt building block at Annex "I" you deem to be relevant disclosure for these products. Please give your reasons.*

Additional information - IOSCO ref X

221. Section X of IOSCO covers a number of different areas of disclosure and CESR is seeking at this stage to establish which of these areas of disclosure is considered to be appropriate for these products.

QUESTIONS

222.	*At this stage do you have views about which of the following sections of IOSCO regarding the issuer's share capital you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.*
	a) Section X.A.1 *b) Section X.A.2* *c) Section X.A.3* *d) Section X.A.4*

e) Section X.A.5
f) Section X.A.6

223. *At this stage do you have views about which of the following sections of IOSCO regarding the issuer's Memorandum and Articles of Association you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.*

a) Section X.B.1
b) Section X.B.2
c) Section X.B.3
d) Section X.B.4
e) Section X.B.5
f) Section X.B.6
g) Section X.B.7
h) Section X.B.8
i) Section X.B.9
j) Section X.B.10

224. *In relation to Section X.C of IOSCO which sets out the Material Contracts disclosure requirements, at this stage do you have views about which material contracts for these products should be summarized in the registration document for these products? Please give your reasons.*

225. *Do you consider Section X.C of IOSCO which sets out the Exchange Controls disclosure requirements to be relevant for these products? Please give your reasons.*

226. *Do you consider that the information about the issuer's dividend policy as set out in Section X.F of IOSCO to be relevant for these products? Please give your reasons.*

227. *In relation to Section X.H of IOSCO which sets out the Documents on display disclosure requirements, at this stage do you have views about which documents should be put on display for these? Please give your reasons.*

228. *Do you consider that information about the issuer's subsidiaries as set out in Section X.I of IOSCO to be relevant disclosure for these products? Please give your reasons*

The disclosure requirements for guaranteed derivative securities.

229. On the assumption that there will be a guaranteed derivative securities registration document building block, the possible disclosure requirements for these securities will follow in the next consultation.

230. CESR considers at this stage that the disclosure requirements for these securities should be drawn from the debt disclosure requirements to reflect the debt characteristics of these products and be tailored to reflect the nature of the product and the different investment decision about the issuer that an investor in a derivative product is making about the derivative issuer.

231. Although CESR discussed that guaranteed derivative securities may be more akin to debt securities than derivatives in that the issuer has an obligation to give an investor some form of return on its investment irrespective of how the underlying instrument to which the derivative is linked performs, the distinction between guaranteed and non guaranteed derivative securities becomes less clear for those products where the percentage of the guaranteed return is small for example less than 5% of the initial return.

QUESTIONS

232.	*Should all guaranteed derivative securities, irrespective of the percentage return they offer an investor, be treated in the same way, or should there be some form of minimum return that is guaranteed for these instruments in order for the product to be classifiable as a guaranteed return derivative as opposed to a non-guaranteed return derivative?*
233.	*If you consider that a percentage benchmark should be set to distinguish between those products where the return is high and therefore additional disclosure about the issuer is justified, please specify what this percentage of return should be, and give a reason for your answer.*
234.	*Do you consider that in addition to the percentage return on the investment, the life of the product should be taken into consideration, so that an instrument that has a 100% capital guarantee return with only a 6 month life cycle should be treated for disclosure purposes differently than a product with 100% capital guarantee but with a 10 year life cycle? Please give reasons for your answers.*

B. Securities Note

EXPLANATORY TEXT

Methodology

235. In order to answer the Provisional Request, CESR has developed three main schedules for the securities note concerning the following types of transferable securities: equity (shares), debt (bonds) and derivatives (other securities). These schedules are attached to the present Consultation Paper (Annexes ”K” “L” “M”).

236. Each one of these schedules is composed of two different kind of items. A first kind of items is those CESR thinks that should be present in all securities notes, whatever the type of security concerned. These Common Items were discussed by CESR Expert Group as a Common Items building block (Annex “N).

237. Other building blocks have been developed by the group which concern the specific items that should be present in all securities notes, depending on the type of security concerned. There are consequently, specific items for equity, for debt and for derivatives.

238. For the sake of practicality, these different building blocks have been incorporated in the above mentioned three basic schedules. However, in order to make it possible to distinguish between the common items and the specific items in each schedule, those items that are part of the specific items have been shaded in grey in the different schedules. For the purpose of this consultation paper, the list of common items is also attached.

239. The schedules have been drafted on the basis of the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and on the existing schedules of the Directive 80/390/EEC which has been replaced by Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

240. Further inspiration has been sought in CESR’s previous work, in particular in “A ‘European Passport’ for Issuers” (FESCO/00-138b of 20 December 2000), in “A ‘European Passport’ for Issuers: An Additional Submission to the European Commission on the issues raised in paragraph 18 of the FESCO report of 20 December 2000” (FESCO/01-045 of July 2001), and in “Stabilization and allotment, a European Supervisory Approach” April 2002 (CESR/02-020b).

241. In order to reflect the origin of the different items listed in the schedules, the schedules are divided in two columns. The left one contains the items. The right one refers to the source of the items.

Building block approach at the point of issue

242. As already stated, the three draft schedules are themselves the result of putting together each time two building blocks (common items + specific items). CESR plans to develop additional building blocks taking account of the different categories of issuers, investors, markets and securities.

243. The draft schedules that are submitted to consultation are core schedules, or minimum schedules. They contain the minimum items that a securities note should, in CESR's opinion, contain for all types of offers or admissions to trading of any type of securities.

244. CESR is aware of the fact that not all securities can easily be defined as strictly belonging to one of the three types of securities for which a schedule has been drafted. For instance, a convertible obligation is a debt security which, under specific circumstances and at certain conditions, can be converted into a share. In such a case, the issuer should be able, under guidance of the competent authority, to add some specific items of the equity schedule to the debt schedule in order to reflect all characteristics of the convertible obligation.

245. Additional building blocks shall also be necessary in order to add specific information regarding the type of issuer, offer, market and security concerned. Those will be developed in the coming months and submitted to a second round of consultation.

LEVEL 2 ADVICE

246. **CESR recommends to adopt three main schedules encompassing the three following main types of securities: equity securities, debt securities and derivative securities.**

247. **These three main schedules should consist of: a) a list of common items identical whatever the type of offer or admission considered, and b) a list of specific items relating to the type of security offered of for which admission is sought.**

248. **In order to draft securities notes for securities that do not strictly belong to one of the three main types, the issuer should be able, under guidance of the competent authority, to add some specific items of another schedule**

to the main schedule chosen in accordance with the most relevant characteristics of the securities offered.

QUESTIONS

249. *Do you consider it an appropriate approach to obtain flexibility by creating specific building blocks on particular characteristics of some issuers, offers, markets and securities?*

250. **Format of the Schedules -** *Is the format of the three main schedules suitable? These schedules are composed of (i) common items and (ii) specific items for each type of securities, amalgamated in one single document. Is this approach sensible or should the common items and the specific items form distinct blocks?*

251. **Complex financial instruments -** *In order to ensure adequate disclosure for securities that do not fall within just one of the three main types, do you agree that the Competent Authority should (as envisaged by Article 21(4)(a) of the amended proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, be able to add specific items of another schedule to the main schedule chosen, that it considers necessary having regard to the characteristics of the securities offered, as opposed to their legal form?*

252. **Section I.2. -** *Should advisers be mentioned in all cases, or only if they could be held liable by an investor in relation with the information given in the prospectus?*

253. **Section I.5. -** *Under Section I.5., the securities note should mention any other information in the prospectus besides the annual accounts, which have been audited or reviewed by the auditors. Should the securities note contain the "auditors report relating to this information"?*

254. **Sections I.6. and I.7. -** *Sections I.6. and I.7. both concern the responsibility attached to drawing up a prospectus. Although under the proposed directive it is possible to choose a format consisting of three documents (Registered Document, Securities Note and Summary), these three documents are considered as making one prospectus. Is it therefore correct to assume that responsibility for each of these three parts must rest with the same persons?*

255. **Section III.A.-** *Under Section III.A., all securities notes must contain a statement of capitalization and indebtedness. Is such a statement necessary for derivatives?*

256. **Section III.B. (III.B.1. for the derivatives schedule) -** *Section III.B. asks to list the reasons for the offer and the use of proceeds. While this is an important item for shares and bonds, is it also the case for derivatives?*

257. **Section III.C.2.(d)** – *Section III.C.2.(d) requires inclusion of a worked example of the "worst case scenario".*
1) Does this information provide material information for investors?
2) Are there circumstances in which an example of the worst case scenario is not appropriate?
3) Would the disclosures as set out below be an appropriate alternative:

a) a risk warning to the effect that investors may lose the value of their entire investment, and/or
b) if the investor's liability is not limited to the value of his investment, a statement of that fact, together with a description of the circumstances in which such additional liability arises and the likely financial effect.

258. **Section IV.A. –** *Under Section IV.A., the interests of experts in the issue or the offer must be disclosed. These interests encompass those of any expert or counselor who "has a material, direct or indirect economic interest in the company". Is it necessary in the case of derivatives?*

259. ***S*ection V.A. -** *Section V.A. lists the items to be disclosed in -order to give a description of the securities that are offered or admitted to trading.*
Should the following additional items be added to Section V.A.:
a) Legislation under which securities have been created; b) Court competent in the event of litigation; c) Redress Service available for investors, if any"?
Should information about the rating of the issuer or of the issues be mentioned under that item?
If yes, which one of the following wording would be more appropriate:
- "Rating assigned to the issue or to the securities by rating agencies and /or commercial bank lenders pointing out the name of the rating organization whose rating is disclosed and explaining the meaning of the rating. If a rating does not exist, to the knowledge of the issuer, it is required to disclose the fact that there is no rating", or
- "Rating assigned, at the issuers requests or with its co-operation, to the issue or to the securities by rating agencies and /or commercial bank lenders, pointing out the name of the rating organization whose rating is disclosed and explaining the meaning of the rating".

260.	**Section V.B.12, first indent of Annex M** – *Section V.B.12, first indent of Annex M requires a statement concerning the past performance of the underlying and its volatility. Is this disclosure necessary? Should the requirement for disclosure vary depending upon whether the underlying instrument is admitted to trading on a regulated market and the nature of the market? Should the requirement for disclosure vary depending upon the nature of the underlying instrument?*
261.	*For the three main schedules, please identify those items that you deem unnecessary.*
262.	*For the three main schedules, please list those items that are missing and that should be in the securities notes.*

PART TWO - INCORPORATION BY REFERENCE

Extract from Provisional Request

263. According to Paragraph 2.2 of the Provisional Request CESR is asked to "*provide technical advice on possible draft rules on at least the following:*
   - *the documents that can be incorporated by reference in a prospectus (e.g. memorandum of association, annual and interim accounts, press releases);*
   - *the documents that can be incorporated by reference in order to fulfil annual update requirements linked to the registration document."*

Introduction

264. As a first step the Expert Group, in order to verify the possible existence of common grounds on the issue of incorporation by reference, drafted a questionnaire aimed at providing an overview of the present practices or legislative measures adopted in each State.

265. No definition of incorporation by reference is provided for in the jurisdiction of those members that have answered the questionnaire. Furthermore, in those jurisdictions that allow incorporation by reference this practice is intended differently. In particular some jurisdictions consider the practice of "shelf registration" as a kind of incorporation by reference because the registration document is incorporated by reference in the securities note. Others consider as incorporation by reference also the possibility for a supplementary prospectus to make reference to a previous prospectus approved by the competent authority less than one year before (as provided for by article 6 of Directive 89/298 and article 23.1 of Directive 2001/34). Others include in the category of incorporation by reference the drawing up of a supplement that is considered as being incorporated by reference in the prospectus (provided for by article 18 of Directive 89/298 and by article 100 of Directive 2001/34) or the circumstance that other documents mentioned in the prospectus are available to investors in the places indicated in the prospectus (documents on display).

266. Finally, in one State, incorporation by reference is provided for by the law for the listing particulars concerning debt securities which are normally purchased and traded in by a limited number of investors who are particularly knowledgeable in investment matters –such as Eurobonds- (see article 27 of Directive 2001/34 concerning the possible omission of information, option left to the Member States). In this case the listing particulars may indicate that the annual report of the company, and the interim report, if any, are incorporated by reference in the listing particulars and that any interested party may obtain,

free of charge, a copy of such documents at the offices of the organisations retained to act as paying agents in respect of the relevant issue.

What is incorporation by reference?

267. The first step is therefore the identification of what is to be intended as incorporation by reference.

268. With incorporation by reference the issuer, when drafting a prospectus or the documents composing it, instead of including the information required by the minimum information requirements directly in the prospectus, may include such information by means of a reference made to an already published document that contains the required information. The information contained in the referred to document is therefore considered as being part of the prospectus as if it were restated in it.

269. Even though the procedure linked to the choice of drafting a registration document and that of the supplements is similar to that of incorporation by reference, the circumstance that the Commission proposal deals with them separately entails that incorporation by reference is an additional practice that the Commission Proposal intends to introduce in Community legislation. The Commission Proposal in fact provides for incorporation by reference in article 11, while it provides for the registration document in articles 5 and 12 (when indicating the format of the prospectus), and in article 9 for the validity of the prospectus and in article 16 for supplements.

A . DOCUMENTS THAT CAN BE INCORPORATED BY REFERENCE IN A PROSPECTUS

EXPLANATORY TEXT

Factors which need to be taken into account in deciding whether and when a document may be incorporated by reference in a prospectus

270. In order to identify, as required by the Provisional Request, which documents may be incorporated by reference, it is fundamental to recall that the aim of incorporation by reference is to simplify and reduce the costs of drafting a prospectus. This aim however should not be achieved to the detriment of the other interests the prospectus is meant to protect. In fact according to present directives (article 11 of directive 89/298 and article 21.1 of Directive 2001/34) and to the Commission's Proposal (article 5.1 of the amended version) the prospectus must contain all the information necessary in order to enable the investor to make an informed assessment of the proposed investment. To this aim, when evaluating whether documents may or may not be incorporated by reference, besides the simplification of procedures and reduction of costs for

issuers, the circumstance that the natural location of the information required is the prospectus, should be considered.

271. These aspects should also be borne in mind by the competent authority that, when approving the prospectus, should allow incorporation by reference only to the extent that procedures are simplified for issuers but not complicated for investors also in terms of comprehensibility and accessibility of the information. Therefore, adequately balancing the interests of issuers and those of investors, it should be possible to incorporate as many documents as possible provided that the interest of investors of receiving at no cost an easily analysable prospectus is duly protected.

Characteristics of the documents incorporated by reference

272. CESR acknowledges the fact that documents incorporated by reference are part of the prospectus and therefore the regime applicable to them should, as far as possible, be the same as that of the prospectus.

273. For the safeguard of this principle CESR believes that only incorporation by reference of those documents that are drawn up in the **same language** of the prospectus - or of the documents composing it into which the relevant information is incorporated (registration document, securities note, supplements) – should be allowed.

274. The provisional request mentioned in the previous paragraph was based on the first version of the Commission proposal. The amended version of the proposal, in article 11, paragraph 1, provides that "*Member States shall allow information to be incorporated in the prospectus by referring to one or more previously published documents, which have been approved or filed in accordance with this Directive, in particular pursuant to article 10, or with Titles IV and V of Directive 2001/34/EC.*" Even though this is not a final text of the Directive, CESR has taken this version in consideration.

275. The Commission Proposal therefore already provides that the documents containing the information that may be incorporated by reference must be previously published and filed or approved in accordance with the Directive or with Directive 2001/34. This is linked to the fact that the procedure of incorporation by reference is meant to simplify and reduce the costs of publication of the prospectus: only if the documents incorporated by reference have been published before the drawing up of the prospectus or the documents composing it, does incorporation by reference appear to be useful for the achievement of the said goal. It should be kept in mind that approval is required only if national legislation in the context of the transposition of the requirements of the mentioned Directives, so provides.

276. The reference made to article 10 of the Commission proposal implies that the documents incorporated by reference should have been published according to the requirements provided for by legislation transposing also Company Law Directives, and Regulation on IAS.

277. According to article 11, paragraph 1 of the Commission proposal the information incorporated by reference "*shall be the latest available to the issuer.*" CESR is of the opinion that this provision does not mean that the prospectus cannot incorporate by reference historical data. If documents containing information that has undergone material changes are incorporated by reference the prospectus should clearly state such a circumstance including the updated information.

278. In order to allow the correct evaluation of the documents incorporated by reference, CESR is of the view that these documents should be filed with the competent authority previously or together with the prospectus.

LEVEL 2 ADVICE

279. **The documents that can be incorporated by reference in a prospectus, besides the characteristics provided for by article 11 paragraph 1 of the Commission proposal:**
- **Should be drawn up in the same language of the prospectus or of the documents composing it (registration document, securities note, supplements) into which the information is incorporated by reference.**
- **Should have been filed with the competent authority either previously or together with the prospectus.**

280. **According to the above listed characteristics the following documents may be incorporated by reference in a prospectus:**
- **annual and interim financial statements;**
- **merger and de-merger documents;**
- **auditor's report ;**
- **memorandum and articles of association**
- **earlier approved and published prospectuses;**
- **press releases.**

QUESTIONS

281. *Do you think that the above illustrative list is acceptable?*

282.	*Should further technical advice be given on the documents that can be incorporated by reference in the prospectus? In the case of an affirmative answer please indicate which technical advice should be given.*

B. DOCUMENTS THAT CAN BE INCORPORATED BY REFERENCE FOR ANNUAL UPDATING OF THE REGISTRATION DOCUMENT

EXPLANATORY TEXT

283. According to the Article 10 of the amended version of the Commission proposal there is no longer an obligation to draft an annual update of the registration document. There is a new obligation to update at least on a yearly basis information related to the issuer that would be included in a prospectus. According to the Commission's proposal this update is not requested under the form of a new drafted document but might be done by reference to the place where the information is given or the documents are published or available. This procedure is not a form of incorporation by reference because this implies the drafting of a prospectus or a registration document. The specific request on documents that can be incorporated by reference for annual updating of the registration document does no longer seem to be appropriate.

C. ADDITIONAL TECHNICAL ADVICE

EXPLANATORY TEXT

284. As previously recalled, the Provisional Request asks CESR to provide technical advice "*at least*" on the documents that may be incorporated by reference in the prospectus and for the annual updating of the registration document. CESR believes that other considerations on the practice of incorporation by reference should be made.

285. In particular CESR considers fundamental the indication of specific rules concerning the accessibility of the documents incorporated by reference. As said before, when indicating the characteristics of the documents that may be incorporated by reference, this practice should be allowed taking in consideration the identification and accessibility of the information for investors.

286. As far as the accessibility of the incorporated documents is concerned, CESR, according to article 14.1 of the amended version of the Commission Proposal, is of the opinion that the modalities should be the same as those provided for the prospectus. Therefore the documents should be available, at no cost, in the

same places where the prospectus should be made available. A paper copy should also be available free of charge on request. When the prospectus is made available in electronic form the documents incorporated by reference, and solely these documents, should be linked to the prospectus with easy and immediate technical modalities. The documents should be made available to anyone for the same period as the prospectus.

LEVEL 2 ADVICE

287. **The documents incorporated by reference should be made available with the same modalities as the prospectus. Therefore the documents incorporated by reference should be available at no cost in the same places where the prospectus should be made available and for the same period of time. A paper copy should be given free of charge on request.**

288. **When the prospectus is made available in electronic form the documents incorporated by reference, and solely these documents, should be linked to the prospectus with easy and immediate technical modalities.**

QUESTIONS

289.	*Should other aspects concerning the accessibility of the documents incorporated by reference be considered?*
290.	*Should CESR give other technical advice on further aspects of incorporation by reference? In the case of an affirmative answer please indicate which technical advice should be given.*

PART THREE - AVAILABILITY OF THE PROSPECTUS

Extract from Provisional Request

291. According to paragraph 2.3. of the Provisional Request, CESR is asked to "*provide technical advice on possible draft implementing rules on at least the following:*
   - *Availability in an electronic format – principles on ensuring a wide electronic access;*
   - *Availability via the press (periodicity of newspapers: minimum circulation, nature of the newspaper: financial, general).*"

Introduction

292. The basic principles and features of the regime of the availability of the prospectus are already established at Level 1 legislation, in particular in article 14 of the Commission Proposal.

293. According to the provisions of the Commission Proposal referred to above and considering the developments in the Council of the European Union, the following principles should be kept in mind, as premises of CESR's technical advice:

The means of availability of the prospectus eligible for the purposes of the Directive are [2]:

[2] The prospectus is deemed to be available when it is published by one of the means referred to in this paragraph. It is assumed, although, that this circumstance does not prevent the issuer/offeror from publishing, additionally, the prospectus by other means, such as by its insertion in the gazettes of stock exchanges in which the securities are traded or admission to trading is sought.

- *by insertion in one or more **newspapers** circulated throughout the Member States in which the offer is made or the admission to trading is sought, or widely circulated therein, or*
- *in the form of a **brochure** to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered offices of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents, or*
- *in **electronic form** on the issuer's website and, if applicable, on the web-site of the financial intermediaries placing or selling the securities, including paying agents.*

294. The competent authority shall publish on its website over a period of twelve months, at its choice, all the prospectuses approved or at least the list of prospectuses approved in accordance with Article 13, including, if applicable, a hyperlink to the prospectus published, on the website of the issuer.

295. In the case of a prospectus drawn up with several documents and/or with information incorporated by reference, the documents and information composing the prospectus may be published and circulated separately as long as the said documents are made available, free of charge, to the public, according to the arrangements established in paragraph 2 of article 14, with a link between those documents.

296. The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, should at any time be identical to the original version approved by the competent authority.

297. Where the prospectus is made available by publication in electronic form, a paper copy must nevertheless be delivered free of charge by the issuer, the offeror, the person asking for admission to trading or the financial intermediary placing or selling the securities.

298. The supplement to the prospectus is published in accordance with at least the same arrangements as were applied when the original prospectus was disseminated.

299. Considering that, in respect to the European legislation currently in force regarding the availability of the prospectus, the main new feature of the regime established in the Commission Proposal is the recognition of the possibility of using modern technologies in addition to the already existing arrangements, the Expert Group drafted a questionnaire in order to have an overview of the present practices or legislative measures adopted in each State. In particular specific questions were made on the existence of any conditions/limits regarding the publication of a prospectus in electronic form.

300. In a vast majority of the States the posting of the prospectus on the website of the issuer and/or financial intermediaries is a customary practice, even if it does not substitute the traditional means. In one State, if the securities are offered via the Internet it is mandatory to post the prospectus in the Internet. In addition, currently several competent authorities and market operators make the prospectus available on their own websites. The main conditions indicated for the publication of the prospectus on a website are the issue of a press release indicating the date of availability and the internet address; specific limits regarding the file format; the need to make a clear distinction from other kinds of information, such as advertising; the inclusion of specific warnings related to the addressees of public offers; and the need for a certificate of authenticity where the issuer declares that the electronic version is the same as the hard copy. CESR has taken these practises in consideration when preparing the required advice for level 2 implementing measures.

301. Any reference to the prospectus made in Part Three of the present document should be read as including the prospectus as a single document, the documents that compose the prospectus - registration document (when used as a part of a prospectus), securities note, and summary -, and any supplement to the prospectus.

A. AVAILABILITY IN AN ELECTRONIC FORMAT

Explanatory Text

302. Besides the principle, already stated in the Commission Proposal, that the text and format of the prospectus, whatever the means of publication, should be identical to the version approved by and filed with the competent authority, to ensure that availability of the prospectus in electronic format is an equal alternative to the traditional means of publication, CESR is of the opinion that additional safety measures are required.

303. It is, at least, necessary to ensure that i) the prospectus is easily accessed when entering the website in question; ii) the file format is such that the prospectus cannot be modified, either by the issuer or third parties with access to the website and to the file; iii) the prospectus in itself does not contain hyperlinks, in particular links to information that may contain subjective and biased opinions, such as price targets and advertising documents with the exception of links to the electronic addresses where information incorporated in the prospectus by reference is available; and iv) the prospectus can be easily downloaded (and, consequently, the investor is provided with any necessary software) and printed.

304. CESR is also of the opinion that, due to foreign regulations regarding the definition of public offer it should be made clear that the availability of a prospectus for a public offer in the Internet does not constitute, by itself, an offer addressed to residents in all jurisdictions. Therefore, CESR strongly recommends the insertion of a disclaimer to ensure that ineligible investors cannot subscribe for the offer.

LEVEL 2 ADVICE

305. **The publication of the prospectus in electronic form, pursuant to Article 14 (2) c) of the proposed Directive or as an additional mean of availability, should be subject to the following requirements: a) The prospectus should be easily accessed when entering the web- site; b) The file format should be such that the prospectus cannot be modified (e.g. pdf-file); c) The prospectus cannot contain hyper-links, with exception of links to the electronic addresses where information incorporated in the prospectus by reference is available (in such a case only the documents incorporated by reference should be made available); d) The investors should have the possibility of downloading and printing the prospectus.**

306. **If a prospectus for public offer is made available on the web-sites of issuers and financial intermediaries, these should take measures, such as the insertion of warnings related to the addressees of the offer, to avoid targeting residents in other jurisdictions where the public offer does not take place.**

QUESTION

307. *Should there be technical implementing measures at Level 2 further defining what is deemed to be "easy access" and which specific file formats are accepted for this purpose?*

B. AVAILABILITY VIA THE PRESS

Explanatory Text

308. According to the proposed directive, when an issuer/offeror chooses to publish the prospectus by its insertion in one or more newspapers, these newspapers should circulate "*throughout the Member States*" or be "*widely circulated*

therein". Level 2 measures should indicate the scope, periodicity, and nature of such newspaper. CESR believes that in deciding such features, the following issues should be borne in mind.

309. With regard to the scope of the newspaper, CESR is of the opinion that the publication of the prospectus in a national or supra-regional newspaper (in the sense that it widely circulates throughout the territory of the State) should be required for the purposes of compliance with the duty of making a prospectus available to the public.

310. As far as minimum circulation is concerned, considering that the circulation (number of copies sold to the public) of newspapers depends upon the geographic area, number of inhabitants and reading habits in each Member State, the setting up of a given threshold is not recommended. In alternative, the need for the eligible newspapers to be broadly read may be dealt with by establishing that the prospectus must be published in one of the 8 newspapers with major circulation, as ranked by an independent entity.

311. As far as the nature of the eligible newspaper is concerned, it is worth noting that there are newspapers of very specific natures (general, financial, culture, sports, advertisings, etc) and not all of them are suitable for the publication of a prospectus. CESR considers that the prospectus should be published in a general newspaper or in a financial/business newspaper**,** as long as its circulation satisfies the minimum circulation requirements.

312. Finally, with regard to periodicity, CESR believes that when the minimum circulation and nature of the newspapers requirements are complied with, the issuer/offeror should not be prevented from publishing the prospectus also in non daily newspapers.

LEVEL 2 ADVICE

313. **The newspaper where the prospectus is inserted according to Article 14 (2) a) of the proposed Directive should comply with the following requirements: a) It should have a national or supra-regional scope; b) It should be one of the 8 national newspapers with more circulation in the Member State, as ranked by an independent entity; c) It should be a general or financial information newspaper.**

QUESTION

314.	*Are there any additional factors and/or requirements that should be taken into account at Level 2 concerning the availability via the press?*

C. ADDITIONAL TECHNICAL ADVICE

315. In addition to the issues particularly asked for in the Provisional Request, CESR is of the view that there are three other matters regarding the availability of the prospectus that would require Level 2 implementing measures. One concerns the disclosure in a formal notice of the chosen means of publication of the prospectus. The second issue regards the measures that should be taken into account when making the prospectus available in the form of a brochure. The third concerns the delivery of a paper copy when the prospectus is available in electronic format.

C. 1. Notice stating where the prospectus is available

Explanatory Text

316. Article 10.4 of Directive 89/298 (for public offer prospectuses) and in article 98.2 of the Directive 2001/34 (for listing particulars), state that a notice must be inserted in a publication designated by the Member States in which the admission of securities is sought or the public offer is made. According to the answers to the previously mentioned questionnaire, this rule is followed in all jurisdictions and the notice is usually inserted in the official gazettes of stock exchanges in the case of listing particulars.

317. The Commission proposal does not provide for the publication of such notice neither in its first version nor in the lately amended one.

318. Nevertheless, in order to assure that investors are duly informed and have wide and easy access to prospectuses, CESR believes that the implementation of the principles established in the Commission Proposal requires the publication of such a notice stating that a prospectus (a part of it or a supplement to it) has been published and where it is available.

319. CESR is of the opinion that Level 2 measures should deal with the arrangements for the disclosure of this notice and its minimum content.

320. CESR believes that the means of publication of the notice should depend on, and be different from, the means of publication of the prospectus. If the prospectus is published in a newspaper or is available in the form of a brochure, the investors on the Internet would be informed about the publication of the prospectus by a notice posted on the issuer's website. If the prospectus is posted on the issuer's website, a notice should be published in a newspaper that fulfils the requirements for publication of prospectuses.

321. The notice is not supposed to be an abstract of the prospectus since its aim is that of informing the public that a prospectus from a given issuer and related to given securities has been published and where it is available.

LEVEL 2 ADVICE

322. **When a prospectus is published or made available pursuant to Article 14(2) of the proposed Directive, a notice stating that such document has been published and where it is available should be disclosed by the issuer / offeror according to the following arrangements: a) When the prospectus is inserted in one or more newspapers or is published in the form of a brochure, the notice shall be made available on the issuer's web-site; b) When the prospectus is published in electronic format, the notice shall be inserted on one or more newspapers that fulfil the requirements for publication of prospectuses.**

323. **The notice shall be made available or published no later than the next business day following the date of publication of the prospectus.**

324. **The notice shall contain, at least, the following items of information: a) The identification of the issuer; b) The type, class and amount – if already known- of the securities to be offered and/or in respect of which admission to trading is sought; c) The intended time schedule of the offer /admission to trading; d) A statement that a prospectus has been published and where it is available; e) If the prospectus has been published in the form of a brochure, the addresses where and the period of time during which such brochures are available to the public; f) If the prospectus has been made available in electronic form, the addresses to which investors should refer to ask for a paper copy; g) The date of the notice.**

QUESTIONS

325. *Do you consider appropriate the requirement to publish the said notice in the absence of a specific provision in the Directive proposal?*	
326. *Should the minimum content of the notice be determined at Level 2 legislation?*	
327. *When the prospectus is made available by its insertion in one or more newspapers or in the form of a brochure, besides the publication of a specific notice, should the list available at the web-site of the competent authority (see Introduction) mention where the prospectus is available?*	

328. *In case of an affirmative answer to the previous question, should the indication in the website of the competent authority be considered enough and, consequently, should it be considered as an alternative to the publication of a formal notice by the issuer/offeror?*

C. 2. Publication in the form of a brochure

Explanatory Text

329. CESR is of the opinion that when the brochure is composed of more than one separate documents, it should be made clear that each of such documents should not be seen as a complete prospectus *per se*. CESR therefore, recommends that this circumstance be clearly stated.

LEVEL 2 ADVICE

330. **If the prospectus is composed of more than one separate document, each of them should clearly mention that it does not constitute the complete prospectus brochure.**

QUESTION

331. *Which other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR's technical advice?*

C.3 Delivery of a paper copy

Explanatory text

332. Insofar as the delivery of a paper copy of the prospectus is concerned, when it is available in an electronic format, CESR considers necessary to implement general measures regarding, in particular i) the timing for the delivery, which must not hinder the investors' right to have the prospectus in due time; ii) the number of copies that each investor may require, not burdening unreasonably the issuer/offeror or their representatives; and iii) the investor should not be required to pay mail costs.

LEVEL 2 ADVICE

333. **The following measures should apply to the duty of delivering a paper copy (also a print of a computer file) free of charge of the prospectus to the investors on request, when the prospectus is available in an electronic**

format: a) The issuer should deliver a paper copy to the investor, as soon as possible, allowing investors to consult the prospectus in due time; b) The issuer/ offeror, or their representatives, are not required to deliver more than one paper copy to each investor; c) The investor should not be required to pay mail costs.

QUESTIONS

334.	*Do you agree that the issuer should not ask the investor the payment of the deliver or mail costs?*
335.	*Should additional issues regarding the delivery of a paper copy of the prospectus be dealt with by Level 2 legislation?*

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